

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Comcast Cablevision of Danbury, Inc.)	CSR-5969-A
)	
Petition For Modification of the DMA Market of)	
Television Broadcast Station WFUT(TV))	
Newark, New Jersey)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 2003

Released: January 15, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Comcast Cablevision of Danbury, Inc. ("Comcast") filed the above-captioned petition seeking to modify the designated market area ("DMA") of television station WFUT, Channel 68, Newark, New Jersey to delete certain communities located in the Danbury, Connecticut area ("Comcast Communities").¹ Univision Partnership of New Jersey, licensee of WFUT ("Univision"), previously submitted a must carry Complaint against Comcast for failure to carry WFUT on its cable television system in the Comcast Communities. We recently granted this complaint and directed Comcast to carry WFUT.² The purpose of Comcast's petition is to exempt Comcast from the Commission's must carry requirements to carry WFUT on its cable system. Univision filed an opposition to the petition and Comcast replied. After examining the record, we deny Comcast's request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992* ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.³ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.⁴ A DMA is a

¹The cable communities at issue are as follows: Danbury, Bethel and Ridgefield, CT. Petition at Appendix A.

²*Univision Partnership of New Jersey v. Comcast Cablevision of Danbury, Inc.*, 17 FCC Rcd 16837 (MB 2002); *as modified by* 17 FCC Rcd 18327 (MB 2002).

³8 FCC Rcd 2965, 2976-2977 (1993).

⁴Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by

geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁵

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁶

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁷

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * *

Nielsen Media Research's DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order"); 47 C.F.R. §76.55(e).

⁵For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶47 U.S.C. §534(h)(1)(C).

⁷*Id.*

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁸

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁹

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note to paragraph [2]: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.¹⁰

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station

⁸H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁹*Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

¹⁰The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

advertising and sales data or viewer contribution records.¹¹

Petitions to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. WFUT is a full power television broadcast station that operates as an affiliate of the Telefutura Spanish language television network.¹² It is licensed to Newark, New Jersey, which is assigned to the New York DMA, and broadcasts from the Empire State Building in New York City. The Comcast Communities are located approximately 57 miles from WFUT's city of license. In support of its request, Comcast argues that, although the cable communities in question are located in the New York DMA, which includes WFUT, the statutory factors considered in market modification cases support deletion of the Comcast Communities from the station's DMA. This would result in exempting Comcast from the Commission's must carry requirements to carry WFUT.

6. We now consider the statutory factors based upon the facts supplied by the parties. The initial factor is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."¹³ Comcast states that although WFUT has been licensed to Newark, New Jersey, for twenty-eight years, it has never been carried by the cable system in the Comcast Communities and this reflects that geographically it is not part of the same market as the Comcast Communities.¹⁴ In considering this statutory factor, we must determine the circumstances contributing to this lack of historic carriage.

7. While admitting that Comcast has never carried WFUT in the Comcast Communities, Univision states that it did not acquire the station until late in 2001, and began Telefutura network programming in January, 2002, and, therefore, for all intents and purposes, WFUT is a new station in the market with specialty programming that is completely different than the programming of the prior owner.¹⁵ Univision further responds that Comcast has historically carried every other full-power television station licensed to the same community as WFUT, stations licensed to communities in the vicinity of WFUT's city of license, and all stations operating from the same transmitter site at the Empire State Building. Univision explains that this confirms that WFUT is in the same market as these other stations with regard to the Comcast Communities, and that it is discriminatory for Comcast to refuse to carry WFUT on its cable system while carrying other similarly situated stations.¹⁶ Comcast states that because a station has specialized appeal does not mean that its market area is unlimited or that it should be exempt from the market modification process.¹⁷ Comcast also indicated that only one other station is licensed to Newark and it is a noncommercial television station. Further, that only one other station is

¹¹47 C.F.R. §76.59(b).

¹²The Commission approved Univision's acquisition of WFUT in May of 2001. The Telefutura network was launched in January of 2002. Prior to Univision's acquisition of the station, WFUT operated as a Home Shopping Network station.

¹³47 U.S.C. §534(h)(1)(C).

¹⁴Petition at 5-6.

¹⁵Opposition at 18-20.

¹⁶*Id.* at 6-7, and 22-23.

¹⁷Reply at 19-20.

licensed to the same transmitter site as WFUT, although other stations are operating from the Empire State building under Special Temporary Authority because of the destruction of their licensed transmitter site, the World Trade Center (both sites located in New York City).¹⁸

8. We are not persuaded by Comcast that WFUT's lack of historic carriage on its cable system should be given significant weight. The station was recently acquired and broadcasts specialty programming. Its current format bears no relationship to any of its previous identities. The Commission has recognized that specialty stations, because of their small or limited audience, have not been widely carried by cable operators absent must-carry obligations. WFUT's lack of historical carriage, therefore, is not especially relevant because of its status as a specialty station.¹⁹

9. The first statutory factor, moreover, directs us to consider as an alternative criterion whether a cable television system carries other television stations licensed to the same geographic area as the station it is seeking to exclude. If other stations are carried, this indicates that the contested station and the cable system may properly be included in the same DMA. Although New Jersey is separated from New York by the Hudson River, there are eight television stations (excluding WFUT) in New Jersey included in the New York DMA. Comcast currently carries WNET which is licensed to Newark, New Jersey, the same community where WFUT is licensed. Comcast carries three other stations (WWOR, WNJU and WXTV) on its cable system which are licensed to communities close to Newark.²⁰ We also note that WFUT transmits from the Empire State Building, and that Comcast carries the other New York stations (nine stations) transmitting from the Empire State Building. Although most of these stations are now operating under Special Temporary Authority, they are licensed to a nearby transmitter site in New York City. Therefore, in applying the initial statutory factor, we find that Comcast has historically carried other stations licensed to the same area.

10. The above reflects that these stations, including WFUT, are located in the "hub" of the New York DMA. As observed by the United States Court of Appeals for the Second Circuit in *WLNY-TV, Inc. v. FCC*, New York City serves as a "hub," and stations in the hub often have programming and advertising of widespread interest across the DMA. Broadcast stations located at the "hub" of a DMA, therefore, "will ordinarily have no problem satisfying the four factors listed in the statute, and will be able to repel requests for exclusion."²¹

11. The second factor to consider is "whether the television station provides coverage or other local service to the community."²² We find that this factor weighs in favor of granting Comcast's request because of a lack of local programming by WFUT. Comcast contends that rather than providing local programming, the station appears to serve as a conduit for satellite-delivered national programming directed to a general audience.²³ In response, Univision states it is "utilizing the local programming windows on Saturday and Sunday mornings to broadcast half-hour programs produced in conjunction with [two] stations... [in] Hartford, Connecticut. Univision also asserts that WFUT is developing an independent half-hour weekly public affairs program to address the needs... of minority residents... in the Communities."²⁴ Comcast argues that Univision failed to "identify the names, air dates or topics of

¹⁸*Id.* at 6-9.

¹⁹See *CoxCom, Inc.*, 17 FCC Rcd 17192, 17195 (2002).

²⁰Petition at Appendix B and *Television & Cable Factbook 2002* at A-1, A-1586 and A-1588.

²¹163 F. 3d 137, 144 (2d Cir. 1998).

²²47 U.S.C. §534(h)(1)(C).

²³Petition at 10-11.

²⁴Opposition at 18.

WFUT's supposedly local programming," and that, in any case, WFUT should not receive "credit for the recent or planned launch of a minimal amount of local programming near the pleading stage of a market deletion proceeding."²⁵ We are not convinced from the evidence submitted by Univision that WFUT offers significant programming directed at the cable communities in question. It is also not clear from the record that Univision's stated programs have ever been broadcast on a regular basis. We further find that these programs, even if regularly scheduled, are insufficient to establish "coverage of or local service" to the Comcast's communities.²⁶

12. As a related issue, Comcast indicates that WFUT's Grade B contour covers only a small portion of the Comcast Communities and leaves the majority of the cable system outside the contour. Thus, WFUT does not provide local over-the-air coverage to the Comcast Communities. Comcast provided a signal contour map which reflects that one of the three Comcast Communities, namely Ridgefield, was within the Grade B contour, and that the contour extended north from Ridgefield almost halfway to Danbury and Bethel, which are approximately nine miles north of Ridgefield. Comcast, moreover, stated that it conducted off-air measurements of WFUT's signal at various locations in the Comcast Communities and obtained results that were below the Grade B standard.²⁷ Univision responds that the Grade B contour "is only approximately five (5) miles short of wholly encompassing" all of the Comcast Communities, and that the Commission has refused to delete communities that were on the fringe of a station's contour. Univision also conducted signal strength tests at the Danbury headend, which it stated indicated WFUT provided a quality signal to the cable system that complied with the Commission's requirements.²⁸ As noted in paragraph 4 above, the Commission accepts service area maps using Longley-Rice (version 1.2.2) propagation curves which more accurately represent a station's technical coverage area. Neither Comcast nor Univision provided this type of exhibit. We also note that although three communities are involved in Comcast's petition, the Commission's records reflect that they are served by a single cable system. We find that one community, Ridgefield, is covered by WFUT's Grade B contour, and the other two, Danbury and Bethel, are on the fringe.

13. The third statutory factor is "whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."²⁹ In general, we believe that Congress did not intend this third criterion to operate as a bar to a station's DMA claim when other stations could be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.³⁰ In this case, because other stations serve the communities in question, this enhancement factor does not appear applicable.

14. The fourth factor is "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community."³¹ We agree with Univision's argument that because WFUT is a "specialty" station, very little weight should be given to its lack of

²⁵Reply at 15-16.

²⁶See *CoxCom, Inc.*, 17 FCC Rcd at 17196. The decision also involved a Univision station and may have presented a stronger case for local programming, but the Commission found insufficient local programming.

²⁷Petition at 7, and Exhibit D.

²⁸Opposition at 4, 13, and Exhibit A.

²⁹47 U.S.C. §534(h)(1)(C).

³⁰See, e.g., *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997).

³¹47 U.S.C. §534(h)(1)(C).

viewership.³² The Commission has long recognized that such stations, by their very nature, have limited audience appeal.³³

15. Comcast also argues that its petition to modify the New York DMA of television station WFUT to delete the Comcast Communities in the Danbury, Connecticut area should be controlled by the Commission's 1997 decision in *Comcast Cablevision of Danbury, Inc. ("Comcast/WHSI")*.³⁴ This decision involved the same Comcast Communities and television station WHSI, Smithtown on Long Island, New York, a satellite station of television station WHSE, Newark, New Jersey, which operated as a home shopping network station. Both stations were subsequently acquired by Univision and are now WFTY and WFUT respectively. In the *Comcast/WHSI* decision, the Commission granted Comcast's petition to modify the New York market area to exclude the Comcast Communities from WHSI's market area. Comcast states that the Commission found in its favor in the *Comcast/WHSI* decision because of lack of historical carriage, technical service, local programming and ratings. Comcast claims that its current petition involving WFUT presents an even stronger case for deletion because of less technical service and geographic proximity.³⁵ Univision responds that the *Comcast/WHSI* decision is not relevant because Comcast's petition was unopposed; involved the prior owner, a home shopping network; and the Commission may have believed that duplicative programming was involved.³⁶ Although there are similarities between the *Comcast/WHSI* decision and Comcast's current petition involving WFUT, there are also a number of differences. WHSI had been operating for over ten years and lacked ratings in the Comcast Communities whereas WFUT is under new ownership with new programming, its current format bears no relationship to its prior identity. The Long Island Sound, moreover, creates a considerable natural barrier between WHSI's location and the Comcast Communities. As we state in *Continental Cablevision of Western New England, Inc.*, "The Long Island Sound separates the station from the cable communities and effectively increases the distance involved for commercial and marketing purposes."³⁷ Further, as discussed above, Comcast carries on its cable system a number of other television stations licensed near Newark which indicates that the Newark area may properly be considered in the same market as the Comcast Communities. WFUT has the characteristics of a "hub" station whereas WHSI on Long Island appears to qualify as a "spoke" or "rim" station in the New York DMA, and, therefore, is subject to greater risks in exclusionary proceedings.³⁸

16. The use of DMA market areas is intended "to ensure that television stations be carried in areas which they serve and which form their economic market."³⁹ Changes in these market areas are sometimes warranted "to better effectuate the purpose" of the mandatory carriage requirements.⁴⁰ In light of the evidence presented above, we conclude that deletion of the Comcast Communities from WFUT's market for mandatory carriage purposes would not fulfill the purposes of Section 614 of the Communications Act. Thus, we deny Comcast's DMA modification request.

³²Opposition at 19-21.

³³See, e.g., *Paxson San Jose License, Inc.*, 12 FCC Rcd at 17529.

³⁴*Comcast Cablevision of Danbury, Inc.*, DA No. 97-234 (CSB released Feb. 12, 1997).

³⁵Petition at 3, 7, 9, 13 and 15; Reply at 12-17.

³⁶Opposition at 11-12 n. 41.

³⁷11 FCC Rcd 6488, 6510 (1996).

³⁸*WLNY-TV*, 163 F. 3d at 144.

³⁹*Comcast Cablevision of New Mexico, Inc.*, 16 FCC Rcd 12440 (2001).

⁴⁰47 U.S.C. §534(h)(1)(C).

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and Section 76.59 of the Commission's rules, 47 C.F.R. §76.59, that the captioned petition for special relief (CSR-5969-A) filed by Comcast Cablevision of Danbury, Inc. **IS DENIED**.

18. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁴¹47 C.F.R. §0.283.